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Major Changes Proposed to Endangered Species Act Regulations

The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) published three proposed rules that would revise the regulations implementing portions of the Endangered Species Act. The proposed rules would change the criteria and procedures (1) for establishing protections for "threatened" species; (2) for the listing and delisting of species and the designation of critical habitat; and (3) for the interagency consultation process under Section 7 of the ESA, which is used to determine whether a federal action would jeopardize a listed species' continued existence or result in an adverse modification of the species' designated critical habitat.

Update: The proposed rules were published in the Federal Register on July 25, 2018, and provide detailed information on how the public can submit written comments and information concerning these provisions. Comments for each notice must be received within 60 days, by September 24, 2018.

Any change to the ESA regulations is certain to attract scrutiny and the proposed rules are undoubtedly significant. But the proposed regulatory revisions are measured and less dramatic than what some had predicted. In this update, we describe the proposed changes and highlight their short-term and long-term implications for the protection of listed species.

Rescission of FWS Blanket 4(D) Rule

In the first proposed rule, FWS would rescind its blanket rule under Section 4(d) of the ESA. This blanket rule automatically establishes the same protections for threatened species as for endangered species, unless otherwise specified. This move would align FWS's regulatory approach with that of NMFS, which does not have a similar blanket rule. In place of the blanket rule, FWS would craft rules for each threatened species on a case-by-case basis, so that the applicable prohibitions, protections and restrictions are tailored specifically to the conservation needs of that species.

These changes would not affect the protections that are afforded to species that already have been listed as "threatened." Instead, the changes would apply only to future decisions to list a species as threatened, or to reclassify a species from endangered to threatened.

The Section 4 Rule

In a second, joint proposed rule (the Section 4 Rule), the Services have put forward several changes to the criteria and procedures for listing, delisting and reclassifying species and designating critical habitat. Specifically, this proposed rule would:

- Require that the Services, when making a critical habitat designation, first evaluate areas currently occupied by the species before considering unoccupied areas.
- Require that the Services, when including as part of a critical habitat designation an area that is not occupied by the species, make a finding that "there is a reasonable likelihood that the area will contribute to the conservation of the species."
- Provide a non-exhaustive list of circumstances where the Services may find that designating critical habitat for a species would not be prudent.
- Remove the prohibition in the regulations against referencing the economic and other impacts on landowners as part of a listing decision. The rationale is that this regulatory prohibition is unnecessary and redundant, as the statute itself already expressly requires listing determinations to be based "solely upon

biological criteria." The proposed rule would not allow listing decisions to be based on economic or other impacts, but would allow referencing these impacts when making such decisions if doing so "may be informative to the public."

- Define the term "foreseeable future" (which is part of the definition of "threatened species") to make clear that the meaning of this term "extends only so far into the future as the Services can reasonably determine that both the future threats [i.e., the conditions potentially posing a danger of extinction] and the species' responses to those threats are probable."
- Clarify that the standard for delisting a species is "the same as the standard" for listing a species, and make several changes to the reasons that a species should no longer be listed, including that the species is extinct or does not fall within a taxonomic group that qualifies as a "species" within the ESA's definition of that term.

The Section 7 Rule

The third proposed rule (the Section 7 rule) would change the ESA's interagency consultation procedures. Under Section 7 of the ESA, when a federal agency undertakes, funds or approves an action that may affect a listed species or its designated critical habitat, that agency must consult with FWS or NMFS (depending on the species) to ensure that the action is not likely to jeopardize the species' continued existence or result in the destruction or adverse modification of the species' designated critical habitat.

Definitions. The proposed rule would change the definitions of several key terms under Section 7:

- "*Destruction or adverse modification*" of critical habitat: The rule would add "as a whole" to the end of the definition, such that this term would mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole" The rule also would eliminate the second sentence of the definition, which currently provides examples of prohibited habitat alterations ("Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery.").
- "*Effects of the action*": The rule would eliminate the references in the current definition to "indirect effects" and the effects of "interrelated or interdependent" actions, such that the term would be simplified to mean "all effects on the listed species or critical habitat that are caused by the proposed action, including the effects of other activities that are caused by the proposed action." Causation would be determined by a "but for" test, under which "[a]n effect or activity is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur."
- "*Environmental baseline*": The definition of this term would be retained, but would be moved from the definition of "effects of the action" to its own standalone definition.
- "*Programmatic consultation*": This definition would codify an optional process designed to improve efficiency. This process could be used to evaluate multiple actions within a particular geographic area, or broad agency programs that guide the implementation of future actions by establishing standards, guidelines or governing criteria for such future actions. Of note, the current regulations already include a definition of "framework programmatic action," and thus contemplate programmatic consultation, which—although not specifically defined—is done in practice today.

Moreover, the Section 7 Rule would add a new section clarifying the definition of the term "reasonably certain to occur" in two contexts: (1) activities that are caused by, but are not part of, the proposed action and (2) activities that are considered cumulative effects to those of the proposed action. This new provision is designed to "avoid inclusion of activities whose occurrences would be considered speculative, but also to avoid requiring an expectation that the activity is absolutely certain to occur." The proposed rule includes a non-exhaustive list of factors, including relevant plans and past experiences, to help inform the determination of what is "reasonably certain to occur."

"Jeopardy" Standards. The Section 7 Rule also emphasizes that a federal action is prohibited by the ESA only if the action causes "appreciable" harm to a listed species or its critical habitat. This is an important point, as several recent court cases have ruled that when a species already is jeopardized by degraded baseline conditions, any additional adverse impact is prohibited. The proposed rule rejects this approach as "inconsistent with the statute and our regulations" and takes the position that "there is no 'baseline jeopardy' status even for the most imperiled species."

Initiation of Formal Consultation. In addition, the Section 7 Rule would clarify what is necessary to initiate the formal consultations process, by further describing the information (commonly called the "initiation package") that the federal agency undertaking, funding or approving the action that triggers the consultation must provide to FWS or NMFS, as applicable. In turn, the Section 7 Rule would allow the Services to adopt all or part of the initiation package in the biological opinion.

Expedited Consultation. The Section 7 Rule would provide for a new "expedited consultation" process, which would provide opportunities to streamline consultation for actions that have minimal or predictable effects based on previous consultation experience. This process is intended to apply to projects ranging from those with a minimal impact to those that have a potentially broad range of effects that are known and predictable, but unlikely to cause jeopardy or adverse modification.

Reasonable and Prudent Alternatives. The Section 7 Rule would establish that reasonable and prudent alternatives included in a biological opinion to avoid, minimize or offset the effects of the action "are considered like other portions of the action and do not require any additional demonstration of specific binding plans or a clear, definite commitment of resources."

Reinitiation of Consultation. With regard to the reinitiation of consultation based on new circumstances or information, the Section 7 Rule would not strictly require that such a reinitiation lead to a new *formal* consultation process, thus providing potential opportunities for less formal reinitiation procedures. Also, the rule would establish that the duty to reinitiate does not apply to an existing programmatic land management plan when a new species is listed or new critical habitat is designated.

Additional Issues. Finally, the Section 7 Rule seeks comment on three specific issues:

- Whether to revise the definition of the environmental baseline "as it relates to ongoing Federal actions," by adding language that it "is the state of the world absent the action under review" and includes "ongoing impacts of all past and ongoing" projects in the action area.
- Whether to clarify when federal agencies are not required to consult, including where "the Federal agency does not anticipate take and the proposed action" will: (1) not affect the species or critical habitat; (2) have effects that are manifested through global processes; or (3) result in wholly beneficial effects or effects that cannot be measured or detected in a meaningful way.
- Whether to adopt a 60-day or other deadline for informal consultation and how to appropriately implement such a deadline.

Impacts of the Proposed Rules

The first two rules (under Section 4 of the ESA) may have greater significance in the long term—especially as they may affect the number of species that are listed and the extent to which "threatened" species receive protection. But these changes will have relatively little effect in the near term, because they mostly relate to *future* decisions to list, delist or reclassify a species.

By contrast, if finalized, the Section 7 Rule would have a more immediate effect, because it would change the way interagency consultations are conducted. While some of the changes reflected in the Section 7 Rule are more technical in nature—simplifying the language and clarifying existing requirements, rather than removing such requirements—other changes may have more of an impact, such as rejecting the notion of a pre-existing "baseline jeopardy" and specifying that mitigation actions need not be binding or definite. Additionally, the three questions posed about Section 7 consultation clearly signal that the administration is considering potentially broader changes to the ESA consultation process, in particular the issue of "whether to clarify when Federal agencies are not required to consult" and whether to impose a 60-day deadline on informal consultation.

What's Next?

Unlike draft House and Senate legislation regarding the ESA, which may face long odds in Congress, the administration's regulatory proposals require no congressional approval and could have a substantial short- and long-term effect on the implementation of the ESA. While the administration's proposed changes are more measured than what some had predicted, as the proposed rules move forward, they are certain to attract significant public interest, and potentially opposition from various stakeholders—including from those that believe the proposed rules go too far, and from others that believe more substantial revisions are required. And it remains to be seen whether the administration will propose additional, broader procedural and substantive changes to the ESA consultation process.

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